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Case No: AC-2023-LDS-000259/
AC-2023-LDS 000260

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
LEEDS DISTRICT REGISTRY

Leeds Combined Court Centre,
1 Oxford Row, LS1 3BG

Date: 18/07/2025

Before :

THE HONOURABLE MRS JUSTICE COLLINS RICE DBE CB

- -

Between :

The King on the application of
(1) LMN
(2) EFG **Claimants**

- and -

THE SECRETARY OF STATE FOR WORK AND PENSIONS **Defendant**

- -
- -

Ms Karon Monaghan KC & Mr Tom Royston (instructed by Child Poverty Action Group**)** for the **Claimants**
Ms Galina Ward KC & Mr Yaaser Vanderman (instructed by Government Legal Department) for the **Defendant**

Hearing dates: 17th & 18th June 2025

- -

Approved Judgment

This judgment was handed down remotely at 12 noon on 18 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE COLLINS RICE

Mrs Justice Collins Rice :

Introduction

1. This judicial review claim is brought, with the support of the Child Poverty Action Group (CPAG), by two mothers who are entitled to Universal Credit and affected by the 'two child benefit cap'. The judge who gave permission for the claim considered their cases required a full merits investigation, notwithstanding some procedural considerations which might otherwise have stood in their way. So they now bring an 'in principle' challenge to the regulations made in exercise of the Secretary of State's powers to create *exceptions* from the 'cap'. Those exceptions do not apply to their circumstances. The Claimants contend that, as a matter of law, that is unsustainable.

Context: The Legislative Scheme

2. The 'two child benefit cap' was introduced as a piece of law reform in the field of economic and social welfare policy. It was at the time, and has remained to the present day, a matter of intense political controversy.

3. It takes its place in the scheme of the Welfare Reform Act 2012 ('the 2012 Act'), the large-scale overhaul of the benefits system which introduced Universal Credit ('UC') as the principal machinery for assessing and providing state financial support to individuals and families in need of it. The wider benefits system is of course a substantial and complex component of the architecture of the UK itself, part of our 'social contract', recognised as such in both politics and law: '*The benefits system is sometimes described as an expression of social solidarity: the duty of any community to help those of its members who are in need. The system must be fair and reasonable (not least in the case of non-contributory benefits), if that solidarity is not to be weakened*.' (*R (SC) v Secretary of State for Work and Pensions [2022] AC 223*, at [202]).

4. The Conservative Party manifesto for the 2015 general election identified one aspect of the benefits system it considered *un*fair and *un*reasonable. The calculation of the amount of UC paid to qualifying recipients included an element of enhancement for each child of the family for which they were responsible – without limit. So every new child automatically brought increased UC income into the family. That was not the economic reality for self-supporting families, who have to make sometimes difficult or sad decisions about their family size based on affordability. So, the argument went, it was deeply unfair to oblige them to fund, through the taxation system, an economic privilege or freedom for supported families which they did not themselves enjoy.

5. It was, according to the manifesto, also an economic privilege or freedom which was in absolute terms not affordable for the country. Welfare expenditure was calculated to have more than trebled in real terms in the first decade of the century. The manifesto included a pledge to reduce spending on welfare benefits by £12bn. The Bill that

became the Welfare Reform and Work Act 2016 was introduced into Parliament in accordance with that pledge immediately after the Conservatives' general election victory. It amended the 2012 Act to provide as follows:

> **10. Responsibility for children and young persons**
>
> (1) The calculation of an award of universal credit is to include an amount for each child or qualifying young person for whom a claimant is responsible.
>
> (1A) But the amount mentioned in subsection (1) is to be available in respect of a maximum of two persons who are either children or qualifying young persons for whom a claimant is responsible.
>
> (2) Regulations may make provision for the inclusion of an additional amount for each child or qualifying young person for whom a claimant is responsible who is disabled.
>
> (3) Regulations are to specify, or provide for the calculation of, amounts to be included under subsection (1) or (2).
>
> (4) Regulations may provide for exceptions to subsection (1) or (1A).
>
> (5) …

6. What that meant was that the automatic addition of an extra amount of UC in respect of each child of a supported family stopped after two – a number chosen to reflect the average number of children in families in the UK. (Regulation 4 of the Universal Credit Regulations 2013 provides that the starting point in counting up children in a family for this specific purpose is to look at how many children '*normally live with*' an individual or couple.)

7. The two-child limitation did not otherwise affect entitlement to UC. Other relevant benefits, including Child Benefit, and family enhancements to, for example, housing benefits, continued to be available.

8. The limitation was fiercely debated in Parliament, with strong convictions about what was and was not '*fair and reasonable*' about it expressed, and challenging examples cited, by all sides. Once it had passed into law, it faced a comprehensive human rights challenge in the courts, supported by CPAG. That went all the way to the Supreme Court – the *SC* case already cited. The challengers argued the two-child stopping point for automatic UC enhancements was inconsistent with their rights under Art.8 of the European Convention on Human Rights (to respect for private and family life), Art.12 (to found a family), Art.14 read with Art.8 (to be free from discrimination in enjoyment of their rights to respect for private and family life), and Art.14 read with Art.1 of Protocol 1 (to be free from discrimination in enjoyment of their financial entitlements).

9. The Supreme Court rejected the claim in its entirety. I will look in detail at some of its reasoning. But the Court's decision puts beyond any further legal argument now that the two-child limitation itself is lawful: consistent with parents' and children's protected rights in the context of their private and family life, and not unlawfully discriminatory (not least in relation to women, and to children in larger families). The Supreme Court notably confirmed the provision is not properly characterizable as a measure aimed at discouraging people on lower incomes from having larger families. It is a measure aimed at reducing public expenditure and the burden on the taxpayer, and aimed at giving those supported by benefits the same kind of *economic* choices about family size as self-supporting families, rather than enhanced, or subsidised, choices.

10. The government had published a consultation document in October 2016 about how the power in section 10(4) of the amended 2012 Act, to make exceptions to the two-child provision, should be exercised. Possible exceptions had been discussed during the passage of the Bill, and some of those were canvassed in the consultation document. In particular, the document confirmed that the government recognised '*some parents or carers for children are not in the same position to make choices about the number of children in their family as others are*'. It was therefore proposing to use the power to create exceptions, and provide for an additional UC child element to be paid, where a *third or subsequent* child added to a family was (a) the result of a multiple birth; (b) being looked after by friends or extended family as an alternative to being taken into local authority care; (c) born as a result of rape; or (d) being adopted. The first and third of these were distinguished by the absence of any relevant choice at all about adding a third child to a family. The second and fourth involved a distinct strand of policy thinking. This was about the desirability where possible of children, for whom there was no biological parent able and willing to provide a home and discharge their default parental responsibility, living in family arrangements *other than those of their birth* rather than in local authority care – and of the overall substantial saving of public expense thereby.

11. There was a wide range of responses to the consultation exercise, and a further round of submissions to the Parliamentary Secondary Legislation Scrutiny Committee charged with considering the regulations in due course. CPAG in particular objected to the 'non-parental care', adoption and 'non-consensual conception' ('NCC') exceptions applying only to third or subsequent children. It thought the presence of any such child in a family larger than two ought to mean an incrementally larger UC entitlement. Others made the same point. They challenged the logic of outcomes in which the exceptions would have applied to first or second children but not to the third or subsequent child. The government's response was that its logic here was the logic of the two-child provision itself – that two-child families should be subject to the same economic framework when *choosing another* child as self-supporting families. So the exceptions should be limited to circumstances where either there was no choice about conceiving a third child or subsequent child, or where a non-birth family was increased by in effect taking a child out the care system (a net economic and social benefit to the state), where a different economic framework applied anyway. The regulations made in 2017 amended the Universal Credit Regulations 2013 accordingly.

12. But the policy was continuing to evolve in relation to the 'non-parental care' and 'adoption' exceptions. The socio-economic rationale of supporting adoption

arrangements, and finding non-birth-parent alternatives to local authority care, after all existed in whatever order families had (up to two) children of their own and took on other people's children as well. Making no exception where existing non-parental carers and adopters went on to have two children of their own *later* was hard to square with that rationale, and risked introducing perverse incentives and outcomes. That thought was reinforced by some pointed comments made by Ouseley J when the *SC* case was before him at first instance. He said this (*C v SSWP [2018] 1 WLR 5425*):

> *Issue 6: the ordering of the cared for child exception*
>
> [215] The issue here relates to the 2017 Regulations and not to the primary legislation: Mr Drabble [Counsel for the Claimants] contends that the exception in relation to a child cared for by the family is perverse because the availability of CTC [a predecessor benefit to UC] for a third child depends on whether the third child was born before or after the family began to care for the second child. Mr Higlett [witness for the Secretary of State] suggests the justification that, because the cared for child is not to be treated as of any less value than a natural child of the family, and the family, caring for a child, should face the same choice about a third child as would a family not in receipt of CTC, the sequencing provision is rational and justifiable in domestic public law terms.
>
> [216] I do not accept that. I do not think that in so far as it was seriously considered, there is any rational justification for a parent's decision, about whether to have a child of their own, to be affected by whether that decision was made before or after another decision, as to whether they should care for someone else's child, which could need to be made quite independently of a decision about having their own children. The purpose of the exception is to encourage, or at least to avoid discouraging, a family from looking after a child who would otherwise be in local authority care, with the disadvantages to the child over family care which that can entail, and the public expenditure it can require. The choice which the family is being asked to make has a very different and indeed opposite purpose in relation to public expenditure, from that which is part of the principal thinking behind the two-child provision. It is not rationally connected to the purposes of the legislation, and indeed it is in conflict with them. …
>
> [217] It is not the exception itself which is unlawful but the sequencing or ordering part of it. …

13. This decision of Ouseley J did not feature in the subsequent appeal stages of the litigation. It did not need to, because the regulations were amended in the meanwhile. In their current form – that is, in the form in which they are challenged in the present proceedings – the Secretary of State has exercised the power to make substantive

exceptions in respect of (a) adoptions, (b) non-parental caring arrangements, (c) multiple births and (d) children born in circumstances of NCC (as a result of rape or a coercive and controlling intimate relationship). The first two exceptions are available whenever a new child joins the family, including where (one or two) biological children come along *afterwards*. The second two are not. The multiple births exception applies only where the family already has no more than one child of their own. The NCC exception applies only where it is a third or subsequent child who joins the family in that way. There remains no exception in the case of a consensually conceived child born into a family which is already caring for two biological children, whether or not those existing children were themselves born in circumstances of NCC.

The Claimants

14. And that is where the present Claimants find themselves, and why they bring this challenge. They have been anonymised for the purposes of these proceedings, both to protect their children and to protect their own identities as vulnerable women who have endured abusive relationships, including coercive and controlling behaviour up to and including rape. Their histories of survivorship are told in their witness statements. They are chilling accounts of appalling domestic abuse: vulnerable girls barely out of childhood themselves caught in toxic relationships, or repeating cycles of such relationships, in which their personal, reproductive and family autonomy is acutely compromised by the physical, sexual and emotional violence of controlling perpetrators.

15. LMN was 16 years old when she found herself in an abusive relationship with X. He was controlling and violent from the outset. She moved in with him very quickly and soon found herself with an unplanned pregnancy. After her first child was born, she was particularly violently assaulted by X, and police and social services became involved. LMN subsisted in this controlling and violent relationship for twelve years. Three further children were born in circumstances in which the pregnancies were not planned. She finally fled the relationship. X was ultimately arrested and imprisoned because of his treatment of her.

16. LMN quickly fell into a second violent and controlling relationship, with Y. It was short-lived. But the local authority was sufficiently concerned about the welfare of her four children in proximity to Y's violence, that it removed them from the household, initially placed them with their birth father X, and six months later took them all into care. LMN was at this point pregnant with her fifth child, conceived in the relationship with Y.

17. Following the end of the relationship with Y, LMN, again, quickly fell into a third violent and controlling relationship, with Z. She fell pregnant with her sixth child. She contemplated a termination, but Z would not permit it. Within a year of the sixth child being born, the local authority made arrangements for her second child to return from care to live with her.

18. LMN's UC entitlement was then calculated on the basis that the child element would be paid in respect of the first two in age of the children living with her – her second child (X's child, recently returned from local authority care), and her fifth child (Y's child). But the child element would not be paid in respect of the youngest of the children living with her (Z's child) because it could not be established that this child

fell within the NCC exception. LMN does not challenge that particular decision in these proceedings (and indeed it appears that the youngest child has since been recognised as NCC and the exception applied, although not with retroactive effect). Her challenge is to the regulations that produce the result that for a three-child family no additional UC child element is paid even though the first two were NCC children, one of whom rejoined the family from local authority care after the youngest child was born.

19. EFG was 15 when she left home, and 18 when she fell into a violent relationship with W. She became pregnant with his child. Ten days after the boy was born, W raped her. A pattern of repeated rape and controlling behaviour took hold.

20. EFG became pregnant again: her daughter was born prematurely and died shortly afterwards. She became pregnant again as a result of a rape very shortly afterwards, with the same sad outcome: her second daughter was born prematurely and did not live long. At around this time, her son was taken into local authority care, and was later adopted.

21. The following year, EFG became pregnant twice again. On each occasion W forced her to terminate the pregnancy.

22. Two children followed after that, a daughter and a son, each conceived by rape. After a particularly violent attack, in which EFG feared for her life, she fled with her two children. W killed himself shortly afterwards.

23. EFG was able to move on to a new, consensual, relationship. An unplanned pregnancy ensued, but EFG and her partner proceeded with it on the basis that her partner was reassuring that he would be able to support her and all three children. But he lost his job. EFG updated her UC claim when her son was born. It appears she was told (erroneously) that the fact that her two older children were NCC meant the child element would be available for the new baby. Her son was followed by a daughter, another unplanned pregnancy. At this point, she was told the UC child element was not after all payable for either of her last two children. Again, she does not challenge in these proceedings that particular sequence of decisions. Her challenge is to the regulations that produce the result that a family comprising two children conceived by rape, followed by two unplanned children in a consensual relationship, has no exception from the two-child limitation, while a family comprising the latter followed by the former does, and receives the child element for all four.

The Claim

24. The Claimants have permission to challenge the application to them of the Universal Credit Regulations 2013, as amended ('the Regulations'), to the extent that they produce the results complained of, namely that there is no UC child element available to them in respect of the third child (in age) they have living with them, and in EFG's case the fourth child, because the exceptions in the Regulations do not apply to them. There is no dispute that *is* the effect of the Regulations. The challenge is therefore to the Regulations themselves.

25. The challenge is not – and could not be in the light of the Supreme Court's decision in *SC* – to the two-child provision in the primary legislation itself. That is lawful, and in

particular ECHR-compliant. The Supreme Court had noted the power to make exceptions, but it was not put to me that its decision was relevantly contingent on the existence of that power, or on its exercise in any particular respect. So the challenge now is to how the power has (or has not) in practice been exercised. As such, it is a challenge which needs to be handled with some care. I am bound by the decision of the Supreme Court. I cannot entertain a challenge *not to exempt* a claimant from the two-child provision, or to *default* to it, which is in the nature of an attempt to relitigate the lawfulness of the provision itself. I note that danger and seek to avoid it.

26. Nor is the challenge to the framing of the exceptions themselves, as such (in Schedule 12 to the Regulations). It was instead argued before me as a challenge to the 'ordering' provisions which apply to the NCC exception – but not, any longer, to the adoptions and non-parental caring arrangements exceptions. The effect complained of is therefore the one produced by a combination of Regulations 24A and 24B. As relevant, they provide:

> **24A – Availability of the child element where maximum exceeded**
>
> (1) Where a claimant is responsible for more than two children … [the child element of Universal Credit] is to be available in respect of –
>
> > (za) any child … in relation to whom an exception applies in the circumstances set out in –
> >
> > > (i) paragraph 3 (adoptions) or paragraph 4 (non-parental caring arrangements) of Schedule 12; or
> > >
> > > (ii) …
> >
> > (a) the first and second children … in the claimant's household; and
> >
> > (b) the third and any subsequent child … in the claimant's household if –
> >
> > > (i) …
> > >
> > > (ii) an exception applies in relation to that child … in the circumstances set out in paragraph 2 (multiple births), paragraph 5 (non-consensual conception), ….
>
> (2) A reference in paragraph (1) to a child … being the first, second, third or subsequent child … in the claimant's household is a reference to the position of that child … in the order determined in accordance with regulation 24B.
>
> (3) …

> **24B – Order of children …**
>
> (1) … the order of children … in a claimant's household is to be determined by reference to the date of birth of each child … for whom the claimant is responsible, taking the earliest date first.
>
> (2) …
>
> (2A) Any child … to whom regulation 24A(1)(za) applies is to be disregarded when determining the order of children … under this regulation.
>
> (3) ...

27. It is these provisions which produce the effect that LMN's youngest child, who was not recognised as a NCC child, is her 'third' and therefore non-exempt child, rather than her older child who (re-)joined the family from care after the youngest was born. It is also these provisions which confirm that the NCC exception applies *only* to third or subsequent children conceived in that way, and that first or second NCC children do not affect the operation of the two-child provision thereafter. These are the mechanics challenged. The effect challenged is to the decision not to provide an exception for third or subsequent children by reference to the fact that either or both of their older siblings in the family were NCC.

28. The grounds of challenge argued before me were:

- **Ground 1:** unlawful discrimination contrary to Art.14 ECHR, read together with Art.8 and/or Art.1 Protocol 1.
- **Ground 2:** breach of duty to protect from inhuman or degrading treatment contrary to Art.3 ECHR; and/or unlawful discrimination contrary to Art.14 ECHR, read together with Art.3.
- **Ground 3:** irrationality as a matter of public law.

Consideration

Ground 1 (Unlawful Discrimination) & Ground 3 (Irrationality)

(a) Unlawful discrimination – legal framework

29. Article 14 of the European Convention on Human Rights provides:

> **Prohibition of Discrimination**
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

30. There is no dispute in this case about how an Art.14 challenge works, and I can conveniently draw on the summaries in [37] and [39] of *SC* in setting it out. There are four components to be considered. But a 'rigidly formulaic' approach is to be avoided (*Ghaidan v Godin-Mendoza [2004] 2 AC 557* at [133]-[134]).

31. First, the alleged discrimination must relate to a matter that '*falls within the ambit*' of one of the substantive Convention articles. There is no dispute the matter in this case does so. It falls within the ambit of Art.8 because it has to do with individuals' intimate relationships and family life. It falls within the ambit of Art.1 Protocol 1 because it has to do with individuals' financial resources and entitlements. No *breach* of these provisions is necessary to found an Art.14 claim, and no breach is alleged here.

32. Second, only differences in treatment based on an identifiable characteristic or '*status*' are capable of amounting to Art.14 discrimination. Art.14's illustrative list of qualifying 'status' factors includes grounds, such as sex, which the courts regard as inherently '*suspect*' bases for different treatment, but the list is neither homogeneous nor exhaustive; it finishes with the open-ended '*other status*'. The UK and Strasbourg authorities on status were briefly reviewed in *SC* at [69]-[72]. Lord Reed JSC noted '*the issue of "status" is one which rarely troubles the European Court'* per se (otherwise, that is, than as a reference point for the intensity of the review accordingly demanded) but also that, as a distinctive requirement, it must at least mean something which cannot be defined solely by the difference in treatment complained of.

33. Third, it must be possible to identify a *difference* of treatment of persons in an *analogous* or relevantly similar situation. The discrimination may be direct or indirect: an aim or a side-effect. A case may also be able to be founded on a *failure* to treat differently persons whose situations are significantly different (*Thlimmenos v Greece (2000) 31 EHRR 15* at [44]). These are all in the nature of factual and evaluative questions, sometimes requiring evidence but sometimes able to be resolved on an analytical basis.

34. Fourth, the measure producing the difference in treatment will be unlawfully discriminatory only if it has no objective and reasonable *justification*: that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the aim pursued and the measure used to pursue it. The approach recommended by Lord Reed JSC in *Bank Mellat v HM Treasury (no.2) [2014] AC 700* at [74] to questions of proportionality is to answer four questions:

> (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;
>
> (2) whether the measure is rationally connected to the objective;
>
> (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective;
>
> (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure

> will contribute to its achievement, the former outweighs the latter.

And in considering the question of justification, a *margin of appreciation* may be allowed to states to make their own assessment, but the scope of that margin will depend on the circumstances, the subject-matter and the context.

(b) Status

35. The '*status*' proposed for the Claimants is 'mothers of non-consensually conceived children'. Ms Monaghan KC, leading counsel for the Claimants, said that was a clear and objectively determinable characteristic; it was dependent on their biological sex; and there was no dispute that as a matter of fact the Claimants had this status.

36. Ms Ward KC, leading counsel for the Secretary of State, objected that, on closer inspection, that could not be the status relied on. For the purposes of a discrimination claim, their distinctive status must be 'mothers of three or more children, comprised of at least one non-consensually conceived child but no more than two consensually conceived children, whose most recent child was consensually conceived'. And that was an impermissible status, because it was defined solely by reference to the difference in treatment complained of.

37. Ms Monaghan KC objected that was to conflate the issues of 'status' and 'difference in treatment'. I agree. They are distinct stages of the analysis. Status cannot be defeated by arguing that it *must* be defined in terms of the difference (or non-difference) in treatment complained of, and then objecting to it on those very grounds.

38. 'Mothers of NCC children' is not a status reverse-engineered from the outcomes produced by the Regulations. It is clear and objectively determinable. It is dependent on (or a subset of) biological sex. It is a subdivision of 'women' and further of 'mothers', and defined by reference to their having been subjected to gender-specific violence or coercion of a kind capable of resulting in conception and childbirth. It is therefore in my judgment not only a legitimate status, but one where, if discrimination is identified, it will be of a highly 'suspicious' nature in the sense to be understood from the caselaw – that is, one heightening the intensity of the review required in the later stages of the analysis.

39. I also hold firmly in mind the rarity of the occasions on which the UK or Strasbourg courts have been prepared to dismiss discrimination claims on status grounds. I am not prepared to do so here. I am satisfied the Claimants are properly entitled to test their treatment by the Regulations in relation to their status as mothers of NCC children.

(c) Discrimination

40. The Claimants advance two distinct lines of argument here.

41. First, they object that the Regulations treat UC recipients who are mothers of NCC children *the same as* UC recipients who are mothers of consensually conceived children, when that difference ought to have led to their being treated differently. This is a *Thlimmenos* argument. It is a challenge along the following lines. The two-child limitation applies to both groups of mothers. No UC child element is available to either

when a third child is born. But the Regulations elsewhere expressly recognise that there is a material difference between the two classes. In the first place, there is an *exception* from the limitation for the mother of any third or subsequent child who is NCC. And in the second place, a large part of the rationale for the statutory scheme is the element of *choice* about bringing children into a family; but mothers of first or second NCC children did *not* choose to do so. Further, the nature and quality of the choice available to a mother of two NCC children to have a first consensually-conceived child is distinctively and relevantly different from the choice available to a mother of two consensually-conceived children to have a third.

42. Second, they object that the Regulations treat UC recipients who are mothers of NCC children *differently from* UC recipients who have adopted or are caring for other people's children when they are in an *analogous* or relevantly similar situation. The adoption and non-parental caring exceptions are not subject to the 'ordering' provision, but the NCC exception is. They say that mothers of NCC children have an analogous decision to make about whether and how they go on to accept such a child into their family. NCC children, particularly where the non-consensual element arises out of an abusive or violent continuing intimate relationship, may be more likely than others to need to be taken into local authority care on that account. That should be compared to the non-parental care ground that a claimant '*has undertaken the care of [a child] in circumstances in which it is likely that [the child] would otherwise be looked after by a local authority*' (paragraph 4(2)(h) of Schedule 12 to the Regulations). If taken into care, NCC children may be more likely to be returned to their birth mother to unpredictable timetables (as in the case of LMN's 'first' child). So, the argument goes, the imperative of homing a NCC child with their birth mother as an alternative to residential care is analogous to the imperative of homing with adoptive parents or non-parental carers a child who would otherwise be cared-for.

43. It is plain and undisputed that, in relation to the ***Thlimmenos*** argument, mothers of NCC children *are* treated by the Regulations identically to mothers of consensually-conceived children for present purposes. The two-child limitation applies equally to both. Whether it *should* do – or rather whether the law requires it not to – is the evaluative issue of justification, considered further below. But I note the argument at this point that the *quality* of decisions they face about having a third child is said to be the key differentiating factor: for a mother of two NCC children it is not (only) about increasing family size, it is also about a first opportunity to *choose* consensual conception.

44. It is also plain and undisputed that mothers of NCC children *are* treated differently from those who have adopted or are looking after someone else's children. But there is a live question about whether they are in a genuinely analogous situation.

45. I have limited, if any, evidence that NCC children *are* in fact more likely than consensually-conceived children to be received into care. That is a complex, evaluative and multifactorial decision focused on a child's best interests and welfare, and one in which the circumstances of conception play no part as such. A child's continuing exposure to domestic violence or abuse, which certainly is a highly relevant factor in such decisions, is by no means unique to families in which that was the distinctive feature of the child's conception, nor is it an *inevitable* continuing feature of every NCC mother's family life (as EFG's case illustrates). Being the mother of a NCC child may well be more strongly correlated to these and other risk factors for a child being taken

into care than simply being a mother in receipt of UC. But that is in the end an empirical proposition which was not set out for me in any detail as such, and which I cannot simply assume.

46. But in any event, and even if NCC children *are* at greater risk of being taken into local authority care than others, the key point to be dealt with is that the adoption and non-parental care exceptions reflect a policy which is wholly to do with UC recipients accepting into their families children *other than their own*. Such recipients are accepting parenting responsibilities they would not otherwise have. But the legal default applicable to *all* birth mothers is that they have parental responsibility for their biological children, whether their conception was freely-chosen, planned, unplanned or non-consensual. (By sections 2 and 3 of the Children Act 1989, a birth mother has automatic parental responsibility for her child (unless given up for adoption, and subject to the child's not having been taken into local authority care or placed elsewhere by court order); parental responsibility means '*all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child*'.)

47. In this, again, mothers of NCC children are not treated differently from mothers of consensually-conceived children, since the law of parental responsibility makes no relevant distinction between them. The two-child limitation applies equally to both, including in relation to any children returning to the family from local authority care. The Regulations' differential treatment of biological mothers on the one hand and adopters and non-parental carers on the other is rooted in a legal principle that they are *not* analogous: the former have automatic default parental responsibility, and the latter do not.

48. I have thought hard, here as well as below, about Ms Monaghan KC's submissions as to the distinctive nature of the choices mothers of NCC children make. Their choices do necessarily overlap with those facing any woman with an unplanned or unwanted pregnancy. But mothers of NCC children are by definition uniquely vulnerable and disempowered. A woman without full reproductive autonomy may face more frequent pregnancy. Her access to contraception and termination possibilities may be obstructed. (The present Claimants' narratives illustrate both of these features.) Her adoption options may be constrained by her abuser. Because she is not autonomous as to her conceptions, her children may perhaps be characterised analogously as proceeding from 'someone else's' choices, even if they are not 'someone else's' child. And in at least some cases, it is not only the conception but also the father that has not been chosen, in a meaningfully autonomous way or at all. In such cases at least, the argument for analogy with those parenting 'someone else's' child may be clearest, notwithstanding their own biological motherhood.

49. Perhaps the argument from analogy can also be put this way. Adopters and non-parental carers get the child element of UC whenever they 'choose to have one or two *biological* children of their own'. But NCC mothers do not get it whenever they '*choose* to have one or two biological children of their own'. The chosen two-child biological family is unique and distinctive in both cases – in the former by virtue of biology and in the latter by virtue of choice – but they are treated differently.

50. Even so, I hesitate over the claimed analogy with the non-biological parenting exceptions. The biological difference, and the default legal consequences for parental

responsibility, is the whole point and explanation of the difference in treatment (and paragraphs 3 and 4 of Schedule 12 to the Regulations are drafted on that basis). That is so even in the case of LMN's elder child who was returned to her from care, where the argument from analogy is perhaps at its strongest. A *resumption* of parental responsibility – a return to the legal default – is materially different from an *assumption* of parental responsibility. A parent of children in care, who has neither renounced responsibility for a child nor had it permanently removed, makes economic decisions about adding to the family in the necessary expectation that that is not an inevitably permanent arrangement.

51. But in circumstances of any doubt about analogue, I have directed myself to the guidance of the Supreme Court (House of Lords) in *AL (Serbia) v SSHD [2008] 1 WLR 1434* (per Baroness Hale JSC) as follows:

> [24] … the classic Strasbourg statements of the law do not place any emphasis on the identification of an exact comparator. They ask whether 'differences in otherwise similar situations justify a different treatment'. Lord Nicholls put it this way in *R (Carson) v Secretary of State for Work and Pensions [2006] 1 AC 173* at para 3: 'the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to that question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact'.
>
> [25] Nevertheless, as the very helpful analysis of the Strasbourg case law on article 14, carried out on behalf of Mr AL shows, in only a handful of cases has the court found that the persons with whom the complainant wishes to compare himself are not in a relevantly similar or analogous position (around 4.5%). This bears out the observation of Professor David Feldman, in *Civil Liberties and Human Rights in England and Wales*, 2nd ed (2002), p144, quoted by Lord Walker in the *Carson* case at para 65: '*The way the court approaches it is not to look for identity of position between different cases, but to ask whether the applicant and the people who are treated differently are in 'analogous' situations. This will to some extend depend on whether there is an objective and reasonable justification for the difference in treatment, which overlaps with the question about the acceptability of the ground and the justifiability of the difference in treatment. This is why, as van Dijk and van Hoof observe … "in most instances of the Strasbourg case law … the*

> *comparability test is glossed over, and the emphasis is (almost) completely on the justification test".*'

52. It may be that biological motherhood could properly be regarded as an 'obvious, relevant' difference between NCC and other birth mothers on the one hand, and adoptive mothers and non-parental carers on the other. It is a fundamental difference which underpins the legal default position as to the accrual of parental rights and responsibilities, which is in turn one of the most fundamental laws governing family life. But in accordance with the Supreme Court guidance, I must and do exercise great caution before contemplating disposing of an Art.14 challenge on grounds of failure of analogy. In the end, the real question is whether the difference of treatment between mothers of NCC children on the one hand and adopters and non-parental carers on the other can '*withstand scrutiny*' – the scrutiny, that is, of the justification tests.

53. The difficulty of being satisfied of a clear analogue remains problematic, however, because without precise identification of a *properly comparable* difference in treatment, it is hard to be confident of correctly analysing any proposed justification for the Regulations' being designed to produce the difference. But in these circumstances, and again putting the Claimants' case in its essence and at its highest, I proceed on the basis that it is the *Thlimmenos* challenge to the Regulations which is at the heart of their complaint. They say there is no *justification* for mothers of NCC children being treated in the same way as other biological mothers. That is a proposition they argue on its merits on a standalone basis. It is also possible to look at the comparison with adopters and non-parental carers through the same lens: in this too, including at the interface with the care system, they say they are treated, without *justification,* no differently from other biological mothers. I can reconsider and factor in the strength or otherwise of the claimed analogy with adopters and non-parental carers by stepping back and considering the Claimants' arguments about *justification* in the round, including by focusing on the issue of choice, or historical lack of it, which they argue is the key to that issue.

(d) Legitimate Aim

54. I need to begin this part of the analysis by taking several steps back. I am considering the effect of a piece of secondary legislation. Its effect in the present case is to default to the primary legislation – that is, the application of the two-child limitation to the calculation of UC by reference to a per-child element. That is the result of the Regulations introducing some exceptions to that limitation, none of which applies to the Claimants. They do that by their silence. But they also introduce different 'ordering' arrangements for different exceptions, which result in some exceptions providing opportunities for more additional child element payments than others.

55. I remind myself that the justification for the two-child limitation itself, as a *general* default provision, is not, and cannot be, challenged in these proceedings. The matter has been definitively dealt with by the Supreme Court in *SC*. And I remind myself of what the Supreme Court said about the aims being pursued by the default provision:

> [190] It is apparent from the background material described in paras 13-20 above that there were two related 'mischiefs' or problems which prompted the introduction of the legislation. The first was an excessively high level of public spending on

> welfare benefits, resulting in a large fiscal deficit. Addressing this was a major priority of the Government's macro-economic policy at the time, and had been a manifesto commitment at the 2015 General Election. Expenditure on tax credits was a particular concern, as it had more than trebled over the previous ten years or so. It was understood that the introduction of the proposed limitation on entitlement to the individual element of child tax credit would result in significant savings: see paras 13-17 above.
>
> [191] The second problem was the fact that persons in receipt of child tax credits were guaranteed a rise in income for every additional child they might choose to have, without limit. That situation was regarded as unfair to persons supporting themselves solely through work, and as an unreasonable burden to impose on the taxpayers who pay for the scheme. …

56. I remind myself that the Supreme Court confirmed that both were important and legitimate aims for the primary legislation to pursue:

> [202] …the objective of protecting the economic well-being of the country is undoubtedly a legitimate aim for the purposes of the Convention. In particular, a welfare benefits scheme such as child tax credit 'has limited resources and must therefore be guided in part by the principle of control of expenditure', as the European Court observed in *Di Trizio*, para 96 [*Di Trizio v Switzerland (Application No. 7186/09, unreported*]. In that regard the objective of ensuring that a benefits system is fair and reasonable must also be legitimate. The benefits system is sometimes described as an expression of social solidarity: the duty of any community to help those of its members who are in need. The system must be fair and reasonable (not least in the case of non-contributory benefits), if that solidarity is not to be weakened.

57. I remind myself that the Supreme Court confirmed it was *not* the aim, or the known or intended effect, of the default provision to discourage UC recipients from having more than two children ([28]-[29]) – nor, it may be added, to encourage them to have one or two children in the first place. There is no legislative aim either to constrain, or to enable or promote, reproductive choice as such. Unless and until the two-child limitation applies, the scheme is wholly unconcerned with and makes no inquiry into families' reproductive choices, or lack of them. It looks no further than the *fact* of a two-child family living as such and the policy aim of providing some incremental public financial contribution, by way of UC enhancement as well as in other ways, to the parenting of that family, but not doing so further by the UC route if it is further enlarged.

58. As already noted, the Supreme Court was aware both that a power existed in the legislation to make exceptions, and that it had been exercised (see [8] and [206]). It was not itself charged with examining the power and its exercise. But it is elementary public law, and not disputed in this claim, that a power to make secondary legislation must be exercised for the purposes for which it was conferred and within the overall

purposes of the primary legislation within which Parliament conferred it. The aims of the exceptions Regulations *in general* should therefore be expected to be recognisably consonant with those of the primary legislation. That is why I have started this section of the analysis there.

59. Ms Ward KC put it to me that I can recognise on the face of the Regulations that the aims of the primary legislation are continuing to be pursued by the conspicuously sparing use that has been made of the exception-making power: the default provision of the primary legislation remains operative in the overwhelming majority of cases, without differentiation. She also put it to me that, within those aims, there are two further relevant, and distinct, detailed aims being pursued in the Regulations: (a) not to apply the two-child limitation where there has been *no (physical) choice* about conceiving *a third or subsequent child* (the multiple births and NCC births exceptions); and (b) not to apply it to the *taking on* of parental responsibility by non-birth-parents in the alternative to the social and economic costs of a child's having to be placed in residential care.

60. Looked at in those terms, the former is a true exception to the first aim of the default provision (the 'economic' aim) because it involves an additional burden on the public purse; but it is directed to preserving the integrity of, and therefore pursues, the second aim (the 'fairness' aim). The fairness aim is about addressing the 'mischief' of benefits recipients being guaranteed by the taxpayer '*a rise in income for every additional child they might choose to have, without limit*'. The key words there are '*additional*' (that is, additional to two) and '*choose*'. Where there has been no choice or decision about an *additional* conception, the economic framework for any such decision is irrelevant, the 'mischief' addressed by the 'fairness' aim of the primary legislation does not exist, and the aim cannot be said to be being pursued – hence the exceptions.

61. Conversely, the latter can be viewed as a true exception to the second aim (because there has been a full and free choice to bring an *additional* child into the family), but one aimed at preserving the integrity of the 'economic' aim. It would be economically and socially perverse to invest in putting a child into care rather than in an available non-parental alternative home – bearing in mind that that choice arises in the first place *only* where the possibility of the child living with a birth parent with parental responsibility has *already* been eliminated by a prior decision: that the birth parent is unable or unwilling to look after them. (Section 22C of the Children Act 1989 *requires* a local authority to arrange for a child to be placed with their parent *unless* that would not be consistent with the child's welfare or would not be reasonably practicable). The social and financial costs/benefits analysis admits of only one sensible conclusion in relation to the economic aim. A different economic framework applies. That is so whether or not the non-parental adopter or carer is a UC recipient and already has, or goes on to have, up to two children of their own. The economic aim will always remain aligned with promoting a non-parental solution. Hence the exceptions.

62. The potential use of the order-making power was considered during the passage of the Bill, and by way of the public consultation about possible exceptions. I can see from the relevant documentation the affirmation of these aims, and that they represented an underlying aim of making the minimum exceptions to the default provision in the primary legislation: only those necessary to achieve consistency with its own aims. Other possible exceptions were rejected as being inconsistent with these aims. These included a number of policy proposals citing the desirability, or imperative, of

extending the range of exceptions by analogy to circumstances involving a degree of compromised choice, for example where a parent becomes widowed, in circumstances of family breakdown, or where families have religious or moral objection to artificial contraception or such options for termination of pregnancy as the law permits. The present claim does not challenge the choice of substantive exceptions in fact made, nor that they pursue a legitimate aim – the same legitimate aims, ultimately, as those of the primary legislation.

63. The challenge is instead to an exception *not* made, and to the mechanics by which that is produced: the ordering provisions, which work differently for each set of exceptions - and indeed to that difference. But if the exceptions themselves are viewed in the way set out above, then, Ms Ward KC submits, the aim pursued by the ordering provisions falls into place. In relation to the multiple birth and NCC exceptions, it is simply a matter of counting how many older children a UC recipient is parenting ('*living with*'), in order to see whether an exception may be *relevant*. That is the only history, or fact, necessary in order to address the question of whether or not a mother *has* an *additional* (younger) child, bringing the total of children for whom she is caring to more than two – and then of course the question of whether or not she has *chosen* to make that *addition* comes into play. The age-ordering here can be seen as a neutral piece of machinery: its aim is to give effect to the aim of (a) the primary legislation and (b) the exception which serves that same aim.

64. Counting is also necessary in relation to the adoption and non-parental care exceptions. But if the aim of the exception is, consistently with the 'economic aim' of the primary legislation, to support non-parental homing arrangements whether or not the caring family has (up to two) children of its own, then, Ms Ward KC submits, ordering is not necessary because that aim is served in all circumstances. A family receiving UC may have *chosen* an '*additional*' biological child, but that child is not an *additional* potential economic liability for the state over and above the two-child limitation, since all other children in the family are there by virtue of the adopter or carer performing a service which directly relieves the public purse, conferring a public benefit which in the simplest financial calculus far outweighs the cost overhead represented by making the exception from the two-child limit. And pursuing the aim of promoting non-parental family solutions is incompatible with placing it in direct economic competition with a family's choice, if it has one, to have biological children of its own. Trying to make that financially an either/or choice could only, in economic terms, disincentivise caring solutions or, worse, promote the displacement of those solutions if biological children then come along. It is simply the wrong economic framework.

65. The change to the ordering provisions made to accommodate that point, or aim, was not itself consulted upon publicly. Ms Ward KC took me through the internal ministerial decision-making documentation dealing with it. I can see that the aim of preserving the integrity of, and making minimum departures from, the aim of the two-child limit itself remained a powerful policy aim. I can see also that a further strand of thinking gained some traction: a concern that '*all children should be treated equally … regardless of the circumstances in which children already in [a family's] care were conceived or became part of their household*'. This was not a new idea: its application to the original situation in which no special ordering arrangements were in place for the non-parental exceptions was canvassed before Ouseley J when the *SC* case was before

him at first instance, and he was unpersuaded of it in that particular context ([215]-[217] of his judgment). But it returned to the fore subsequently in the following way.

66. The change to the Regulations to disapply the ordering provisions for the non-parental exceptions was considered by ministers at the time to be non-controversial in itself, and was made as part of a small package of tidying or updating changes to the Regulations. The package was treated as non-controversial by the Social Security Advisory Committee, which did not take it to consultation or 'formal reference'. But the whole apparatus of the two-child limit remained highly politically controversial. And the *difference* in the ordering provisions was now a new issue. The change to the ordering provision for non-parental carers threw the spotlight back on to the way the age-ordering provisions continued to apply to the NCC exception. That exception had been controversial from the outset, including at the Bill stage, with many critics, CPAG included, pressing for *no* NCC child to 'count' towards the two-child limit. The new provisions achieved that effect for adopted children and others placed into non-parental arrangements. So the critics returned to the charge that the same provision should be made for NCC children.

67. Having amended the Regulations, ministers reviewed and rejected that proposal. They considered the specific logic, or aim, of the change unique to the non-parental exceptions and their special economic and social objectives. The logic or aim of the NCC exception was different. It operated at the point of establishing whether or not a *third or subsequent* child born into a UC-supported family was NCC. If so, the logic of the exemption applied. If not, the logic of the default two-child limit applied. At no point did the logic of the non-parental exemption provisions apply. It was as simple as that.

68. But it also occurred to those advising ministers to point out that not only would any other position damage the logic of the entire scheme, it would do so by introducing, even if only at a rhetorical level, a proposition that NCC children 'did not count' when considering a *biological* family and a mother's choices to add to it. Again, the difference of biology (and the retention of parental responsibility) was understood to distinguish the NCC exception in this respect from Ouseley J's rejection of this as a legitimate aim of the non-parental exception.

69. Some of the foregoing analysis has now moved beyond considering 'legitimate aim' into the remainder of the issue of 'justification' as a whole. But compartmentalisation, or a '*rigidly formulaic*' approach is to be avoided. And it is important in the present context to establish with as much clarity as possible what the aims of the exception Regulations are. I am satisfied for the reasons set out above that, as they stood pre-amendment, the aims of the Regulations were derived from, consistent with, and supported, the aims of the primary legislation. These have been confirmed by the Supreme Court to be legitimate and important aims. The aim of disapplying the ordering rules for the non-parental exceptions was to maintain those aims by not undermining the achievement of the 'economic' aim. Making the same change for the NCC exception was considered, by contrast, not to advance the 'economic' aim because it would impose a net cost on the public purse; and to undermine the 'fairness' aim by privileging the economic choices of NCC mothers who were UC recipients over those of NCC mothers who were not, by attaching to them automatic income increases, and by failing to treat equally all existing members of a biological family for whom a mother had parental responsibility in law.

70. These, as I understand them, were *in fact* the aims of the measure impugned in these proceedings. I did not understand Ms Monaghan KC to be putting forward a factual dispute about that. In so far as the evaluative question of whether these aims are both '*legitimate*' and '*important*' has not already been disposed of by the Supreme Court in SC, I can conveniently consider them further in the full context of the overall '*objective and reasonable justification*' analysis.

(e) Justification

71. I turn, therefore, to the key question of the overall justification for the measure impugned, containing as it does (a) an NCC exception from the two-child limitation, but (b) differential ordering provisions for the NCC and non-parental exceptions, and (c) making no special provision in respect of third or subsequent (consensually-conceived) children born to mothers of NCC children.

(i) Rational Connection

72. Of these three components, there is no dispute that the first is '*rationally connected*' to the Regulations' aims. The substantive NCC exception, together with the age-ordering provision, delivers part of the policy aim that a mother in receipt of UC looking after two children who has *not chosen* to have an *additional* third or subsequent biological child falls outside the basic logic of the original two-child limitation. The multiple births exception delivers the rest of that aim.

73. There is no dispute either that disapplying age-ordering for the non-parental exceptions is rationally connected to, and delivers, the policy aim that choosing at any point to provide a home for a non-biological child delivers a quantifiable net public financial benefit which is independent of but consistent with the basic economic logic of the original two-child limitation.

74. Nor is there any dispute as to the legitimacy and importance of any of these aims, in themselves.

75. Ms Monaghan KC does however make a challenge to the *difference* in the treatment of the two sets of exceptions, and to the absence of an exception for NCC mothers, on grounds amounting to lack of rational connection. Her premise is that the basic two-child limitation is aimed at families who *choose to have three or more children*. A mother of two NCC children who chooses to become a mother again has not chosen to have three or more children. She has chosen to have one child, having had two forced upon her. The logic that a mother may *choose* to have a family of two, but not three, children without exhausting the availability of incremental UC child elements is not being applied to her. Neither is the logic that *choosing* to have two biological children is independent of the unchosen circumstance of bringing up existing NCC children and managing the risk of their being taken into care.

76. These are challenges to 'rational connection' about which, consistently with the decision of the Supreme Court in SC, I have to be meticulous. The legislative aim on which they are premised is not one the Supreme Court recognised. The aim of the two-child limitation has been confirmed not to have to do with family planning or reproductive freedoms as such, strategic or otherwise. It is not about the freedom to choose to have a family of two consensually-conceived biological children in all, or any

particular, circumstances. It may *impact* on those matters, and I go on to consider that impact, and Ms Monaghan KC's arguments in that context. But the aim of the two-child limitation is (a) controlling public expenditure and (b) maintaining a fair benefits system by not privileging supported over self-supporting families in the economics of addition to an average-sized family. Those are also the aims of the Regulations and the scheme of the exceptions they create. That scheme has a rational connection with those aims, for the reasons I have elaborated above.

77. The fact that the Regulations make no special provision for mothers of NCC children, even though they include an NCC exception, does not alter that. The logic of the NCC exception is self-contained, and is the logic of excepting circumstances where there has been no choice to *add to* a family where the effect of that addition is to make it larger than average. It is a logic which is oblivious to reproductive history other than in purely arithmetical terms. The logic of making no special provision in the scheme for NCC mothers is the logic of placing them in the same position as NCC mothers in self-supporting families, facing sometimes difficult and sad choices within economic constraints.

78. The logic of the differential ordering scheme for the non-parental exceptions is the logic of investing public money in alternatives to local authority care *where a biological family cannot or decides not to look after its own children*.

79. These are different and compatible logics. The scheme of exceptions is '*rationally connected*' to its aims. It passes that threshold test for its lawfulness.

(ii) Less Intrusive Measure

80. I am also satisfied that the test of there being no '*less intrusive measure*' is satisfied. No alternative was suggested to me, or suggests itself, which could achieve the *same* aims. The logic of the exceptions scheme is driven by the logic of the aims of the default two-child limitation. Other exceptions to the limitation are imaginable and were historically considered. But they would have served different aims, and aims which pulled in the opposite direction from those of the scheme.

(iii) Proportionality

81. I turn then finally to the overall proportionality balance. There is considerable and recent caselaw, from both Strasbourg and UK courts, on the correct approach to that balance, including in contexts such as the present. It was carefully and extensively reviewed by the Supreme Court in <u>*SC*</u> at [97]-[162] and I have studied that review with the close attention demanded by its sophisticated analysis and synthesis, and its refined constitutional contextualisation. I gratefully accept the up-to-date assistance it provides, and respectfully adopt the conclusions to which both parties in this case drew my particular attention.

82. The Supreme Court's conclusions about the jurisprudence of the European Court of Human Rights were these:

> [142] In summary, the European court has generally adopted a nuanced approach, which can be understood as applying certain general principles, but which enables account to be taken of a

> range of factors which may be relevant in particular circumstances, so that a balanced overall assessment can be reached. As I have explained, there is not a mechanical rule that the judgment of the domestic authorities will be respected unless it is 'manifestly without reasonable foundation'. The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case. … In the context of article 14, the fact that a difference in treatment is based on a 'suspect' ground is particularly significant. The … cases … indicate the general need for strict scrutiny, focused on the requirement for very weighty reasons, where the difference in treatment is based on a suspect ground such as sex or birth outside marriage, unless the issue concerns the timing of reform designed to address historical inequalities, where a wider margin is likely to be appropriate

83. Reviewing that position in the context of the UK caselaw, the Court concluded as follows:

> [158] … a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified. … But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, … Equally, even where there is no 'suspect' ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.
>
> [159] It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant. …the courts should generally be very slow to intervene in areas of social and economic policy such as housing and social security; but, as a

> general rule, differential treatment on grounds such as sex or race nevertheless require cogent justification.
>
> …
>
> [161] It follows that in domestic cases, rather than trying to arrive at a precise definition of the ambit of the 'manifestly without reasonable foundation' formulation, it is more fruitful to focus on the question whether a wide margin of judgment is appropriate in the light of the circumstances of the case. The ordinary approach to proportionality gives appropriate weight to the judgment of the primary decision-maker: a degree of weight which will normally be substantial in fields such as economic and social policy, national security, penal policy, and matters raising sensitive moral or ethical issues. "…

84. Applying that approach in the present case, I take into account the following in considering proportionality.

85. First, the measure, and the comparative impact, challenged by the Claimants makes (or elects not to make) exceptions to a statutory rule which has already been determined to pursue important and legitimate aims and to be justifiable as a matter of law in its differential impact on women and children. I cannot depart from the rationale of that conclusion.

86. Second, the measure impugned is a piece of secondary legislation. The powers under which it was made were conferred by a piece of primary legislation, or law reform, which the Supreme Court considered to have a particularly high calibre of democratic legitimacy: a manifesto commitment which had been subject to intense parliamentary scrutiny during the legislative process. The exceptions policy reflected in the original regulations had been subjected to and emerged from that intense scrutiny and debate. The exercise of the power to make those regulations in due course had been further subject to public consultation and Parliamentary scrutiny. The Regulations themselves were subject to affirmative resolution procedure in Parliament.

87. The modification of the Regulations to disapply the age-ordering provision for the non-parental exceptions was not itself the subject of scrutiny outside of government. But it was subject to close scrutiny as part of the policy-making process within government. And it is not the disapplication itself which is under challenge but the comparative maintenance of simple age-ordering for mothers of NCC children. It is not quite right to say, as Ms Monaghan KC suggested at one point, that 'the ordering provisions' were not consulted upon. The consultation on the original regulations was explicit (at [14]) that all of the exceptions as originally proposed, and as duly given effect to and subsequently retained for the NCC exception, applied in respect of '*a* ***third or subsequent child***' (emphasis original).

88. Third, the Regulations operate in the field of social and economic policy, just as the two-child limitation itself does. They deal with some particularly difficult matters of social and economic policy, including matters which could be described as raising '*sensitive moral or ethical issues*'. They do so not only in the provision they make, but in the provision they do not make. They make special provision where the default of

biological parental responsibility has been relinquished or removed (at the interface between non-parental family care and local authority care). They make special provision where biological families have been enlarged beyond two children without any choice about that. They refrain from making special provision in *any* other case – whether for mothers of NCC children, mothers who are in or have been in coercive, abusive or violent relationships or who have otherwise been subjected to gender-specific crime, widowed mothers, mothers in circumstances of family breakdown or unification with other families, mothers of unplanned children, mothers of twins, mothers with religious or moral objection to contraception or termination, or mothers in all imaginable circumstances of disadvantage and adversity other than those specifically addressed. And of course they do not assist mothers of NCC children who are not in receipt of UC. These are deliberate policy choices, made and tested in the arena of public and Parliamentary opinion. The limitation of the exceptions is part of the definition of the two-child limitation itself. The scheme of the exceptions – both those made and those deliberately not made – is internally logical and reconcilable with, indeed demanded by the logic of, the aims of the two-child limitation.

89. All of these are considerations which inevitably demand from a court a high level of respect for, and a correspondingly restrained degree of scrutiny of, the measure in question. But in an Art.14 challenge, the '*status*' of mothers of NCC children is properly one which demands intense inquiry of the justifiability of the Regulations' *comparative* treatment of them. That is a countervailing force to the constitutional respect necessarily demanded by all the factors just set out.

90. Mothers of NCC children are treated no differently from other non-exempt mothers, and they are treated differently from (some) other exempted mothers. If the proportionality of, or justification for, that is probed with due intensity, the primary aims and the scheme of the legislation point in the first place to a reminder of the legitimacy and importance particularly of the 'fairness' aim: equalising the economic framework for family enlargement between mothers of NCC children who are recipients of UC and those who are not. Mothers of NCC children in self-supporting families may have excruciatingly difficult choices to make, if and when they reach a point when they *can* make those choices, about going on to add consensually-conceived children to their families. The legislative scheme – primary and secondary legislation – has been framed with the aim of ending the comparative *advantaging* in this respect of mothers of NCC children who are supported by the taxpayer through UC, over those who are not. That is itself a fairness measure. And achieving that parity of treatment is inherently incompatible with any of the solutions the Claimants propose. An exception for them would pursue different aims.

91. My task therefore is to engage with the balance between the severity of a measure's effects on the rights of this class of individuals, defined by biological sex, motherhood and an antecedent history of compromised reproductive autonomy – and on the present Claimants' rights in particular – as against the importance of the objectives the Regulations pursue and the cogency with which they do so.

92. The scheme impacts mothers of NCC children differentially because it treats that status as, in itself, irrelevant. It makes no inquiry into, and takes no account of, their history of compromised reproductive autonomy. It makes no inquiry at all into any UC recipient's reproductive history, beyond counting the number of children they are parenting ('*living with*') at any one time. Where that number exceeds two, how it came

to do *that* may become an issue for inquiry, but in a narrow set of circumstances only, one closely bound up with the premise that the funding community has an entitlement not to be asked to support that increment financially because it would not be '*fair and reasonable*'.

93. So the challenge in this case comes down to the failure of the scheme to accommodate the unique *quality* of the choice a mother of two NCC children makes when she chooses to add a child to her family. Quality of choice is generally disregarded by the scheme. But it does factor it in, to at least some extent, in disapplying the ordering provision for the non-parental exceptions. There, it does recognise something distinctive about starting a freely-chosen biological family, which requires more than a simple headcount of existing family size. A family of two adopted children has access to enhanced public funds when it has one or two biological children of its own. But a family of two NCC children does not.

94. That family is one about which there has been no previous choice at all (other than whether to relinquish parental responsibility – the reverse side of the coin recognised as valid currency in the case of the non-parental exceptions). The argument goes, therefore, that that fact is inseparable from the quality of the choice to '*add to*' it. So radically compromised – indeed altogether absent because it has been criminally overborne – is the role of choice of any description in that family's formation that the decision to '*add to*' it can hardly be called such at all. Mothers of NCC children sustain the consequences of conceptions which they had a *legal right* to avoid, from which they were entitled to the protection of the criminal law, and for which the state visits the severest punishments on perpetrators. That these mothers have then chosen to sustain, and not relinquish, their parental rights and responsibilities, can and should be recognised in the UC scheme without affecting it in any other way. The love and care they are able to provide for these children, conceived without their consent, is a contribution to society of great importance and value. Excepting them would be straightforward. Failure to do so imposes the consequence, or penalty, of increased relative poverty on the mothers who least merit it and may be least able to sustain that consequence. That, the challenge goes, is not fair.

95. That is the nature of the challenge with which a court is being asked to grapple in this case. And the question for me is whether, these kinds of arguments from fairness having been, and continuing to be, conducted by governments and Parliaments over the years, the law protecting individuals from unjustifiable discrimination in the enjoyment of their rights to private and family life and to financial property *forces* a different outcome, and places the outcome delivered in the Regulations definitively outside the scope of the choices they were legally permitted to make. Specifically, is this a matter the law can resolve at all? Does – can – the law *require* the Regulations to be amended so that mothers of NCC children who are UC recipients must be paid a per-child element when subsequent children are consensually conceived?

96. That would, of course, reintroduce an economic disparity with self-supporting families in that identical situation, which it was the important, legitimate and democratically validated aim of the primary legislation to eliminate. It would impose a selective pressure on public spending (I was encouraged to consider it a relatively minor one, but this is a point about the constitutional legitimacy of how such choices between competing priorities are made, not about their quantification). It would also touch on something very fundamental: the nature and law of parental responsibility. Birth

mothers have legal rights and responsibilities in relation to all their children, however conceived, and without distinguishing between them. The 'equal value' aim echoes something very basic indeed about family law.

97. So far as I have been made aware, other than in the NCC exception itself, the law distinguishes between biological conceptions according to their autonomy or otherwise in few and highly sensitive circumstances only. Abortion law is one such context. The recent 'Daisy's law' (enacted in the Victims and Prisoners Act 2024) gives NCC children a new status as victims of crime. If the lens through which the Regulations are viewed is pulled back sufficiently far, as it must be at this stage in the analysis of a discrimination challenge, the question of their place not only in the scheme of the benefits system as a whole, but in the wider scheme of how the law deals with non-consensual conception, comes into focus. It is not necessarily a small, technical and isolated change the Claimants seek, nor one without wider ramifications. That cannot be ignored in considering the question of whether the scheme *must* be changed in the way the Claimants seek. None of that territory was traversed before me. That is unsurprising. It is unmistakeably the territory not of legal analysis but of law reform choices.

98. I remind myself at this point of what the Supreme Court in *SC* concluded about the justification of the two-child measure itself in terms of the proportionality of its impact on families:

> [208] The assessment of proportionality, therefore, ultimately resolves itself into the question as to whether Parliament made the right judgment. That was at the time, and remains, a question of intense political controversy. It cannot be answered by any process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of children and their parents in receiving support from the state, on the one hand, and the interests of the community as a whole in placing responsibility for the care of children upon their parents, on the other. The answer to such a question can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, or of where the balance of fairness lies.
>
> [209] That is what happened in this case. The democratic credentials of the measure could not be stronger. It was introduced in Parliament following a General Election, in order to implement a manifesto commitment (para 13 above). It was approved by Parliament, subject to amendments, after a vigorous debate at which the issues raised in these proceedings were fully canvassed, and in which the body supporting the appellants was an active participant (para 185 above). There is no basis, consistent with the separation of powers under our constitution, on which the courts could properly overturn Parliament's

> judgment that the measure was an appropriate means of achieving its aims.

99. In my judgment, the limited qualification of the primary legislation by the Regulations challenged in this case, cannot ultimately lead to any different place. This challenge again engages directly the issue of the balance between the interests of mothers of two NCC children – and those children themselves – in receiving extra financial support from the state, and the interests of the community in expecting *all* mothers with parental responsibility for their children to discharge that responsibility and manage family choices thereafter within an overall economic framework which does not unfairly disadvantage unsupported families. It is a competition between two socio-economic versions of fairness. The competing arguments about where a '*fair and reasonable*' balance can be struck in this matter are not the sorts of argument a court can legitimately arbitrate or, where they have been settled in a contested political process, with which a court can legitimately interfere.

100. In reaching that conclusion, I bear also in mind these observations of the Supreme Court:

> [162] It is also important to bear in mind that almost any legislation is capable of challenge under article 14. Judges Pejchal and Wojtyczek observed in their partly dissenting opinion in *JD [2020] HLR 5*, para 11:
>
> > "Any legislation will differentiate. It differentiates by identifying certain classes of persons, while failing to differentiate within these or other classes of persons. The art of legislation is the art of wise differentiation. Therefore any legislation may be contested from the viewpoint of the principles of equality and non-discrimination and such cases have become more and more frequent in the courts."
>
> In practice, challenges to legislation on the ground of discrimination have become increasingly common in the United Kingdom. They are usually brought by campaigning organisations which lobbied unsuccessfully against the measure when it was being considered in Parliament, and then act as solicitors for persons affected by the legislation, or otherwise support legal challenges brought in their names, as a means of continuing their campaign. The favoured ground of challenge is usually article 14, because it is so easy to establish differential treatment of some category of persons, especially if the concept of indirect discrimination is given a wide scope. Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process. As Judges Pejchal and Wojtyczek commented, at para 10:

> "Judicial independence is accepted only if the judiciary refrains from interfering with political processes. If the judicial power is to be independent, the judicial and political spheres have to remain separated."

101. CPAG has been a stalwart opponent of the two-child limitation from the outset. It lobbied against it in Parliament. It supported a challenge to it before the courts, all the way to the Supreme Court. It lobbied for the use of the secondary legislation power to make wide exceptions. It said this, in its representations on the Regulations as long ago as March 2017:

> The legislation also fails to recognise that it is not only women who conceive through rape or coercion who can experience an unplanned birth. All contraception methods have a failure rate even when correctly used; parents may be ethically or religiously opposed to contraception or abortion; women with certain learning disabilities or mental health conditions may be less able to take control of family planning, use contraception reliably or resist pressure from a partner; and women in Northern Ireland may be unable to access abortions. Yet no exceptions are provided for these circumstances.
>
> The legislation also fails to recognise that families cannot necessarily guarantee their financial circumstances eighteen years into the future when they decide to have a child. The exceptions offer no protection for families who experience an unexpected reduction in income due, for example, to the death or severe disability / ill-health of a parent, redundancy, separation, or unexpected caring responsibilities (eg for a severely disabled child). …
>
> We also have serious concerns about the design of some of the exceptions proposed in the two SIs. As noted in both explanatory memoranda, the exceptions for adopted children or those in kinship care are intended to keep vulnerable children in family units and out of the care system wherever possible. The exception has been designed to avoid a disincentive to adopt / take on children for families who already have two children or who do not plan to have biological children, but will not have this effect for those considering taking on children *before* having a first or second child of their own. Only third or subsequent children who are adopted or in kinship care count as exceptions under these regulations. We see no justification for this inconsistency and there is a risk that younger people will be disincentivised from adopting or becoming kinship carers, leading to more children entering or staying in the care system. Children in kinship care arrangements might even be sent into the care system if their carers subsequently have, or wish to have, biological children, further disrupting the lives of highly vulnerable children.

> We also see no justification for a similar approach to the exception for rape and coercion, which would see this exception applied only for third or subsequent children. A young woman who is raped and has a child as a result will only be able to receive support for one further child if she later marries and has children with her husband, while a woman who already has two children and is later raped, resulting in a child, will receive support for all three.

102. As we have seen, the Regulations were in due course amended to redesign the non-parental exceptions along the lines CPAG hoped for. But its lobbying for the same outcome for the NCC exception was unsuccessful. The Regulations make a very few exceptions, and they structure them in different ways. Mothers of NCC children remain alongside all the other cases where no special exceptions were made, and the NCC exception itself is not restructured to achieve the result CPAG had hoped for. Now CPAG has supported the present Claimants in a court challenge that *that* was legally unsustainable.

103. The secondary legislation has identified and differentiated between different groups. Despite the ease with which the Supreme Court considered an Art.14 challenge could be framed, I have struggled with the articulation of a clear *relevant* comparator in relation to which mothers of NCC children have been less favourably treated, or more unfavourably impacted, and which amounts to something distinctively different from pointing out that there are moral and political arguments of fairness for them having the benefit of an exception, via a different ordering provision or indeed otherwise.

104. To the extent that a challenge to a failure to exempt traverses the same ground as a challenge to the consequences of that failure – that is, to a default to the two-child limit itself – that is ground I cannot revisit.

105. To the extent that it is a challenge to the differential structuring of the two classes of exceptions, I cannot conclude that, for the reasons I have given, to be anomalous or, if it is, unjustifiably so. The two exceptions pursue the high-level aims of the primary legislation in distinctively different ways, and their structure is cogently tailored to those differences. The 'privileging' of the addition of biological children to families who have adopted or are caring for non-biological children pursues distinct and important aims to do with sustaining family homes for children where parental responsibility is relinquished by or removed from birth parents. It is justified for cogent social and economic reasons – a conclusion which is reinforced by acknowledging that they are not only in practice, as Ouseley J observed, but also in the law of parental responsibility, '*quite independent*' matters.

106. To the extent that a challenge to a failure to exempt the situation of mothers of NCC children – including by the 'non-privileging' of the addition of 'chosen' biological children to NCC families – is a case for that to be considered on its own merits, the aims that non-exemption pursues are those of the primary legislation. The scheme as a whole has always been said by its critics to have a high potential to produce economic consequences which deserve labels such as 'harsh' and 'unfair', not least in circumstances of particular and unchosen disadvantage – and to be defended by its advocates by reference to the 'unsustainable unfairness' of doing otherwise. Ms Monaghan KC makes an argument that the present Claimants' predicament is an

example of unfairness in the present system, and perhaps not the only one. But I am bound to apply the principle of proportionality and exercise my evaluative role in relation to it in a way which is '*consistent with the separation of powers under our constitution*'. I am rightly compelled to distinguish between moral, political or economic arguments about fairness on the one hand and legal arguments about discrimination on the other. My business is solely with the latter. To intervene as the Claimants ask me to, I would have to be able to find a legal basis on which a court could properly overturn the judgment that Parliament has endorsed that not excepting mothers of NCC children from the two-child limitation was an appropriate means of achieving the aims of that limitation and the social and economic balance of fairness it strikes.

107. I have not been able to do so. In my judgment, the question of justification again ultimately resolves itself into a question of whether or not the solution we have at present was the right policy decision, whether or not the Regulations amount to '*wise legislation*', and which of two competing versions of socio-economic fairness should prevail. Like the two-child limitation itself, this was at the time, and remains, a question of intense political controversy. It cannot be answered by a process of legal reasoning. There are no legal standards by which a court can decide where the balance should be struck between the interests of some children and their parents in receiving support, or more support, from the state, on the one hand, and the interests of the community as a whole in leaving responsibility for the economics of family enlargement with parents, on the other. In my judgment, that must include parents who are mothers of NCC children, not least because the implications of overturning the present policy in their favour would touch on fundamental and sensitive matters about how the law deals more generally with the consequences of non-consensual conception in terms of parental responsibility, which cannot be fully and fairly accommodated within a discrimination challenge of this nature.

108. At the invitation of the Claimants I have looked carefully for, but I have not been able to find, a *legal* basis for reaching any other conclusion. Two opposing policy arguments about where, in fairness, the balance between the collective and the individual should be struck, are in contention. It is not enough in the end to be able to articulate *an* argument of fairness, however powerful in its own terms, which would produce the outcome the Claimants seek. It has to be an argument a court can recognise as engaging its compulsive powers to intervene on politically controversial welfare policy and force one version of fairness rather than another in the detail of the benefits system, in a manner which retains constitutional respect. That is not the present case. I cannot conclude that the decisions made by government and Parliament, on a proper analysis, were prohibited by law. I cannot conclude the law obliges them to treat UC recipients who are mothers of NCC children in the way they seek. The answer to the question before me, properly analysed, '*can only be determined, in a Parliamentary democracy, through a political process which can take account of the values and views of all sections of society. Democratically elected institutions are in a far better position than the courts to reflect a collective sense of what is fair and affordable, and of where the balance of fairness lies.*'

(f) Conclusion on Ground 1

109. I cannot in these circumstances uphold the discrimination claim advanced by Ground 1.

(g) Irrationality

110. The claim was put on the basis that irrationality need be considered only if the Art.14 ground were disposed of on the ground of 'status' or 'analogy'. I have not disposed of it on those grounds. The Claimants did not contend that the ordering requirement could be 'justified' yet irrational. The challenges on justification and irrationality stand or fall together. I have concluded that I cannot adjudge any discriminatory effect introduced by the Regulations to be unjustified. For the same reasons, I conclude that the Regulations are not irrational. I cannot uphold the irrationality claim advanced by Ground 3.

Ground 2 – Inhuman and Degrading Treatment

(a) Legal framework

111. Article 3 of the European Convention on Human Rights provides as follows:

> **Prohibition of torture**
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

112. The obligation this imposes on states is an absolute one. But its content depends substantially on context, and the contexts in which Art.3 may be engaged differ widely. The caselaw on the engagement and scope of the Art.3 duty was helpfully summarised by Johnson J in *R (MG) v Secretary of State for the Home Department [2023] 1 WLR 284* at [4]-[8] and I respectfully adopt his summary, allowing for the fact that he was considering both Art.2 (right to life) and Art.3 cases in doing so.

113. In brief, and focusing, as the Claimants invite me to do, on 'inhuman or degrading treatment', a state must not itself directly *inflict* such treatment (the 'negative' or prohibitive duty), and has a range of associated 'positive' duties. The authorities establish what are recognisable as three broad categories of positive duty on a state: (a) a protective 'systems' duty – to put in place systems to safeguard people from such treatment, (b) an 'operational' duty – which arises when a public authority knows or ought to know of the existence of a real and immediate risk of inhuman or degrading treatment from the criminal acts of a third party who is not a state agent, and which requires reasonable measures to be taken to avoid the risk, and (c) an 'investigation' duty – arising when someone has arguably been subjected to inhuman or degrading treatment, or a state has arguably failed in its other positive duties, and requiring that to be formally investigated by the police or by another process capable of establishing the facts and identifying culpability.

114. The 'systems' duty operates at different levels. At a high, or strategic, level, '*the state must ensure that there are effective criminal law provisions to deter offences against the person, a police force to investigate such offences, and a court and judicial system to enforce those criminal law provisions*' (*MG* at [6(3)]). In certain situations public authorities may fall under a lower level, or more specific, duty to adopt administrative measures for safeguarding purposes. The caselaw discussed here by Johnson J focuses on Art.2 cases, which confirm that the duty arises whenever a public body undertakes, organises or authorises dangerous activities, and where a public body is responsible for

the welfare of individuals within its care and under its exclusive control. Here, it is a duty to implement measures to reduce the risk to a reasonable minimum. '*In interpreting and applying the systems obligation, the court must not impose an impossible or disproportionate burden on public authorities and must have regard to the operational choices made by public authorities in terms of priorities and resources* (*MG* at [6(10)]).

(b) The Claimants' challenge

115. The Claimants' narrative challenge takes as its starting point their treatment at the hands of their perpetrators. That included relationship, and specifically sexual and reproductive, violence, abuse, coercion and control of a nature both prohibited by criminal law and destructive of their reproductive autonomy. That was inhuman and degrading treatment of the Claimants by their perpetrators. As such, the argument goes, it engages the positive duties of states to take measures to ensure the protection of individuals from such treatment. The scope of those duties is further informed by the state's international treaty obligations.

116. In summarising their contended application of the law to the facts of their case, I quote from the Claimants' skeleton argument:

> [56] SSWP's treatment of them, in particular by failing to provide financial support in respect of all their children, has been 'degrading' as arousing in its victims 'feelings of fear, anguish and inferiority capable of humiliating and debasing them' in their own eyes, and shows 'a lack of respect for or diminished human dignity'.
>
> …
>
> [62] SSWP's application of the ordering requirement to the NCC exception affects those who are, or are at risk of being, in state care – children like LMN's [elder child]. That is a factor increasing the intensity of state responsibility for the treatment of the Claimants.
>
> [63] As the evidence from Women's Aid demonstrates … the absence of adequate financial support places domestic violence victims such as the Claimants and their children at an increased risk not merely of acute poverty, but of a return to conditions of violence.
>
> [64] SSWP is wrong to submit that … '*to the extent it is argued that having an additional child has been the cause of / has increased the financial pressure on the Claimants, far from being caused by the State, any such financial pressure is a direct result of the choices made by the Claimants. … there is no nexus between the award or non-award of the child element of UC following the birth of a consensually-conceived child … and the historic abuse suffered by the Claimants …*'

> [65] In LMN's case, the 'financial pressure' was triggered by the state's decision that it would be in [her child's] best interests to live with LMN, which (upon LMN agreeing) placed LMN in a position of taking over from the state the care of a child she had not chosen to conceive: exactly the position of a person relying on the adoption or NPCA exceptions. Before that state decision, LMN was not adversely affected by the ordering requirement.
>
> [66] In the circumstances, the inadequacy of the non-consensual conception exception to assist the Claimants and their families is ineffective to comply with the Art.3 procedural obligation to provide effective protection against a breach of Art.3:
>
> a. it places the victims at an increased risk of future harm because without adequate financial support they are more likely to experience future abuse, and
>
> b. it fails to take reasonable steps to mitigate and make reparations for the past harm by reducing the extent of the financial disadvantage connected to the victims' history of domestic violence.
>
> [67] Further or alternatively, since domestic violence is a form of discrimination against women … the failure to provide effective protection to the Claimants breaches Art.14 (discriminating against them on the ground of sex) read with Art.3 ECHR.

117. This was a case developed before me by Ms Monaghan KC with particular reference to the UK's international treaty obligations. These include the Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW'), adopted by the United Nations and ratified by the UK. CEDAW provides, among other things, for states to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations, and in particular to ensure, on a basis of equality of men and women '*the same rights to decide freely and reasonably on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights*' (Art.16(1)(e)). My attention was also drawn to the Council of Europe Convention on preventing and combating violence against women and domestic violence (the 'Istanbul Convention').

118. Ms Monaghan KC also relied on the Strasbourg case of *Opuz v Turkey (2010) 50 EHRR 28*, which adverted to both of these treaties and emphasised the gravity of the issues with which they dealt and the corresponding weight of expectation on signatory states. It also confirmed (at [164]) that, in interpreting the provisions of the ECHR itself, and states' obligations under it, '*the Court will also look for any consensus and common values emerging from the practices of European states and specialised international instruments*' such as those to which my attention was drawn.

(c) Analysis

119. Before considering the content of any duty under Art.3, I have to identify whether and how such a duty could arise in the first place on the facts of this case. Notwithstanding the rhetoric of [56] of her skeleton set out above, I did not understand Ms Monaghan KC to be advancing a proposition that the failure of the Regulations to except the Claimants from the two-child limitation *itself* engaged and violated the *prohibitive* duty of the UK state not directly to subject people to inhuman and degrading treatment *by its own agents*. I was certainly shown no authority coming anywhere close to being capable of supporting such a proposition. The standard of 'inhuman and degrading treatment' is a properly demanding one. It was not suggested, for example, that the application of the default two-child limitation provision reduced the Claimants to a state of financial destitution or personal incapacity itself constituting inhuman or degrading treatment. The two-child limitation is a much-scrutinised and much-challenged provision, but I was shown no basis in its history or its effects for inferring such a radical proposition without the fullest argument to persuade me to do so.

120. I proceed on the basis, therefore, that the argument for the engagement of an Art.3 duty on the present facts is the one Ms Monaghan KC in fact developed – namely that it engages a *positive* duty of the state triggered by the inhuman and degrading treatment of the Claimants by their perpetrators, and which has led directly to the non-consensual conception of some of their children. By not excepting them from the two-child limitation, the UK has failed to do something which Art.3 demands of it in this connection.

121. In terms of the three-part classification of recognised Art.3 positive duties summarised in *MG*, a form of 'systems duty' is the most obvious candidate. The Claimants do not complain of a failure of investigation, or of a failure to protect them from a real and immediate risk of criminal acts amounting to inhuman and degrading treatment. A case founded on a proposition that the absence of an exception for mothers of NCC children '*places the victims at an increased risk of future harm because without adequate financial support they are more likely to experience future abuse*' does not approach the '*real and immediate risk*' standard, even if it were otherwise accepted. The two-child limitation is not a measure dealing with these kinds of matters, nor would an exception from it be recognisably capable of addressing them.

122. Turning then to the possibility of a systems duty, the 'high level' duty is not engaged in this case. I am not considering the criminal justice aspects of non-consensual conception. So I am looking for something at the more granular 'low level' of systems duties. This is not a case to do with 'dangerous activities' of a state. Nor is it a case '*where a public body is responsible for the welfare of individuals within its care and under its exclusive control*'. But here Ms Monaghan KC's submissions do perhaps seek to draw some parallels.

123. She makes two points potentially referable to this well-established potential ground of duty: a general one relating to the Claimants' history of impaired autonomy, and a specific one relating to the interface with the local authority care system. The authorities on this particular basis for an Art.3 systems duty do contain factual analyses of 'autonomy' in various health and welfare contexts. But that is for the purpose of evaluating whether or not a state has, or should be taken to have, accepted a sufficient degree of responsibility for, or exerted a sufficient degree of control over, someone's welfare as to displace the default of 'autonomy' otherwise enjoyed by all natural (adult) persons. Compulsory detention in prison is the most extreme example; other examples

include people in hospitals, local authority care or the military, and the list of examples is not closed. The Claimants here have not had their autonomy modified by the state in any of these or other comparable ways. Nor does the *risk* of intervention by the care system found an Art.3 systems duty; it is the *fact* of intervention or the assumption of responsibility which founds the duty, and that is not the present case.

124. In particular, I cannot accept that the duty could arise out of the return of LMN's child from local authority care. It is not legally correct to analyse that as having been '*the state's decision*' to place LMN in the position of '*taking over*' from the state the care of her child, nor that it was that '*decision*' which itself engaged the ordering rules in the Regulations. As set out already, the legal default is that a biological mother retains responsibility for the care of her child unless she voluntarily renounces it or the child is removed on welfare (or other legal) grounds. In the latter case, if the welfare grounds cease to apply, there is no legal basis for departing from the default position. LMN's child's return was not a state decision overbearing her rights and autonomy. On the contrary, it was required by the law, respectful of her rights as well as her responsibilities as a parent, and ultimately consensual.

125. In any event, this challenge does not relevantly engage with the interface between personal autonomy and state control, so as to enable an Art.3 systems duty to arise from such facts. The Claimants were subjected to violation of their personal and reproductive autonomy by the criminal acts of 'non-state agents'. Their welfare autonomy is not said to have been displaced or removed by, or ceded to, the state.

126. The Claimants' criticism of the absence from the Regulations of an exception applicable to them, whether through disapplying the age-ordering arrangements or otherwise, is that (a) it places the victims at an increased risk of future harm because without adequate financial support they are more likely to experience future abuse, and (b) it fails to take reasonable steps to mitigate and make reparations for the past harm by reducing the extent of the financial disadvantage connected to the victims' history of domestic violence.

127. The first of these is predicated on the effect of the default two-child limitation being to leave them '*without adequate financial support*' and *therefore* vulnerable to future abuse. Those are empirical propositions which were not developed or evidenced before me. They turn on a premise that the benefits system as a whole, including the default two-child limit, does not provide adequate financial support to UC claimants who have suffered a history of domestic violence – and that an exception from the limit for mothers of NCC children would. That is a proposition which leaves the evaluative and socio-economic question of '*adequate financial support*' hanging in the air, and which pays no address to the multiplicity of other measures the state has taken to support victims of domestic violence and the risks they face. It has implications far wider than the circumstances of these Claimants. It is not a proposition with which a court can adequately grapple (certainly not on the materials before me) – much less recognise as founding an Art.3 duty.

128. The second criticism is of failure to take reasonable steps to mitigate and make reparations for past harm by reducing the extent of the financial disadvantage connected to an individual's history of domestic violence. I was shown nothing in the Art.3 jurisprudence to suggest that it founds a positive duty on a state to make reasonable, or

any, financial reparations for historical harm suffered by the victims of domestic violence or to address any continuing financial disadvantage connected to it.

129. It is right that unincorporated international treaty obligations are capable of informing the interpretation of legal duties, including those arising under Art.3. But they are not capable of *founding* such duties. And I cannot in any event see any *duties* of the necessary specificity in the instruments I was shown. It is also right that the categories of circumstance capable of founding a positive Art.3 duty are not closed. But there is nothing in the Strasbourg or UK caselaw that I was taken to which is even adjacent to a basis for an Art.3 positive duty on the facts of this case. And I hold in mind the warning given in *R (Ullah) v Special Adjudicator [2004] 2 AC 323* that it is not my function to develop human rights law further than I can be '*fully confident*' that the ECtHR itself would go. I cannot see it has gone there already. I am far from confident it would go there. On the contrary, the leap from the existing caselaw to an intervention from an Art.3 basis in the detailed engineering of state welfare benefits of the sort contemplated here would be one of startling dimensions.

(c) Conclusions

130. This is a challenge to a welfare benefits measure contained in secondary legislation. I was shown no case where it has been established that the rights conferred by Art.3 are capable of importing a positive duty on a national government or legislature to provide financial assistance, through the welfare benefits system, at one level rather than another, for mothers with a history of experiencing relationship abuse and sexual violence, whether resulting in NCC children or not. I was shown no even arguably factually analogous decision in the UK or by the Strasbourg court, and no relevant practice in other member states. Even if such a duty could be imagined and rendered statable, I cannot see any basis on which it could be argued to have been breached by a decision not to confer an exception for mothers of two previous NCC children who are not otherwise exempt from the two-child limitation – rather than by taking any of a large number of other imaginable measures. The detailed constraint on sovereign legislatures and democratic decision-making in the social and economic sphere of welfare benefits which that would entail cannot be reconciled with existing and established constitutional and human rights jurisprudence. The challenge on grounds of breach of a substantive Art.3 duty must fail.

131. I have been unable to recognise any applicable Art.3 positive duty relevant to this challenge. I am unpersuaded that Art.3 is engaged at all in this case. But if it is, by virtue of the Claimants' mistreatment by their perpetrators, I received no developed submissions on how an associated Art.14 challenge might succeed by reference to Art.3, in light of the sort of analysis I have set in relation to Ground 1 in relation to Art.8. If, as submitted, the engagement of Art.3 is with the facts of previous domestic abuse and the risk of future abuse, the relevance of an exception from the two-child limit to those factors does not speak for itself.

132. The child element of UC and the issues of choice and parity with unsupported families at the point of enlarging a family beyond two children have nothing to do with pursuing aims relating to the special needs and vulnerabilities of those subjected to domestic violence, even the extreme violence of enforced conception. The child element of UC has to do with contributing to the costs of raising a child, within a framework bounded by average family size and a very small number of exceptions referable to families

expanded beyond that number without choice or by caring for others' children. I do not understand how an Art.3 ***Thlimmenos*** argument could be raised on such a foundation. Nor is a plausible, more favourably treated, analogue any easier to perceive through an Art.3 lens than it was through an Art.8 lens.

133. No case was developed in submissions to assist me on these points. Nor was a case made to me on how a proportionality analysis could produce an outcome on justification more favourable to the Claimants on the basis of Art.3 engagement than on the basis of Art.8 engagement. It is true that Art.3 creates *unqualified* rights and duties. Nevertheless, where a *proportionality* challenge is made, the route by which it could be followed to the conclusion invited must at least be charted. The problems I have outlined in being able to identify and articulate a relevant Art.3 duty at all in the present case must in these circumstances limit the extent to which I can keep trying to cantilever out an analysis of the Claimants' Art.14 case from such an unstable foundation. If there is something missing from my existing Art.14 analysis which provides a better outcome for them on Ground 2 than it did on Ground 1 then I cannot be left simply to guess at what it might be.

134. I cannot in these circumstances uphold either limb of the claim relating to inhuman and degrading treatment advanced by Ground 2.

Summary and Decision

135. This case was brought by two recipients of UC benefits who are survivors of appalling relationship abuse. That abuse involved sustained physical, sexual and psychological violence. It involved the radical abridgment of their personal, and particularly their reproductive, autonomy – up to and including rape and coerced conception. They are among the most harmed and vulnerable members of our society, while, as mothers discharging their parental responsibilities, making an important and valuable contribution to it.

136. They are supported in this claim by the Child Poverty Action Group, which makes a case that the UC 'two child benefit cap' should not apply to them, unless and until they have been afforded the opportunity everyone else takes for granted – if they can, to bring two children into the world as a result of freely-chosen intimacy within a freely-chosen relationship. This is an argument which takes its place in the intensely controversial political debate within which both proponents and opponents of the 'two child benefit cap' have advanced their views over the years, in which CPAG has played an active and tireless role, and which continues to the present day. To the extent that it is conducted in the political arena and in the forum of public opinion, that is where the argument will ultimately be resolved.

137. This claim, however, brings it into the legal arena, seeking a determination to force a particular outcome. This is not for the first time. CPAG supported a public law and human rights challenge to the 'two child benefit cap' brought as long ago as 2017. That made its way to the Supreme Court, which, in 2021, firmly returned the matter to the political realm. There were, it concluded, no *legal* standards by which a court could decide where a balance should fairly be struck between the interests of parents and children in enhanced state financial support and the interests of the wider community required to pay for it.

138. Some limited exceptions to the 'two child benefit cap' have been made by Regulations. They do not assist the present Claimants. So this case brings the 'two child benefit cap' back in front of a court by way of a public law and human rights challenge to this failure to exempt. To the extent that this rehearses arguments about how the 'two child benefit cap' works, albeit in one particular set of circumstances, the matter has been settled by the Supreme Court. To the extent that it brings in new perspectives, based on arguments about unjustifiable disparity of treatment, breach of state duty, or irrationality, introduced by the exceptions Regulations, I have, for the reasons I have set out, reached the same place as the Supreme Court did before. There is no *legal* analysis, or standards, by which a court can decide whether or not UC recipients who are mothers of two non-consensually conceived children should receive additional financial support from the state by excepting them from the 'two child benefit cap' and paying the child element of UC for a further one or two consensually-conceived children. It is a policy question dealing in social, economic, moral and ethical subject matter. It is also a question with potential resonances in family law more generally. It is a political law-reform question.

139. The law does not compel a government, or a Parliament, to provide the answer the Claimants seek. This claim is dismissed accordingly.